Supreme Court, U.S.
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No. 98-89

In The

Supreme Court of the United States

October Term, 1997

J.A. CROSON COMPANY,

Petitioner,

v.

J.A. GUY, INC., ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Supreme Court Of Ohio

RESPONDENT J.A. GUY, INC.'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Ohio Prevailing Wage Law and accompanying regulations are preempted to the extent that they would prohibit conduct protected by federal labor law, namely, an employer's deduction of Union dues from employee wages pursuant to employee authorization where the dues are used in a union job targeting program.

PARTIES TO THE PROCEEDING

The parties to the proceeding are as stated in the Petition for Writ of Certiorari. Respondent J.A. Guy, Inc. has no parent or subsidiary company.

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STATEMENT OF THE CASE

This case involves the claims of J.A. Croson Company ("Croson") that J.A. Guy, Inc. ("J.A. Guy") has violated state law by engaging in activity protected by federal law. The conduct at issue is J.A. Guy's deduction of union dues from employee wages for a job targeting program used by the Union to defray the costs of Union contractors so that more work will be available for Union members. Deduction of these dues is both required by the collective bargaining agreement to which J.A. Guy and the Union are parties and expressly protected by federal law. Under bedrock principles of federalism, federal law must prevail, and Ohio law cannot be applied to prohibit such federally protected conduct.

On June 15, 1993, Croson filed this action, alleging that J.A. Guy, a competitor, violated the Ohio prevailing wage statute by deducting union dues from wages paid to employees on two public improvement projects. The United Association of the Plumbers and Pipe Fitters Industry of the United States and Canada Local 189 ("Local 189") was also made a party to the action. On March 28, 1995, the trial court granted motions of J.A. Guy and Local 189 for summary judgment and held that application of the prevailing wage law as urged by Croson would allow the state to regulate the amount of dues which could be withheld from Union members' paychecks and the purposes to which those dues could be put and that these issues are preempted by federal law.

On May 8, 1995, Croson appealed to the Ohio Court of Appeals, Fourth District. On October 4, 1996, the

appellate court reversed the trial court's decision, creating a conflict with two other Ohio appellate court decisions establishing that state law challenges to deduction of union dues are preempted by federal law. *Independent Electrical Contractors of Greater Cincinnati, Inc. v. Hamilton Cty. Div. of Public Works*, 101 Ohio App. 3d 580 (1995), and *J.A. Croson v. Central Ohio Joint Vocational School Dist.*, 104 Ohio App. 3d 146, *jurisdictional motion overruled*, 74 Ohio St.3d 1418 (1995), *cert. denied*, 517 U.S. 1155 (1996).

The Ohio Supreme Court allowed appeals in this matter and determined that a conflict existed between the Ohio appellate decisions. The Court ordered the parties to brief the following issue:

> Whether federal labor law preempts a claim that a union employer's deduction of union dues for a union "industry advancement" or "job targeting" fund violates Ohio's Prevailing Wage Law, R.C. 4115.10, et seq., and state regulations adopted thereunder.

On April 8, 1998, the Ohio Supreme Court issued its decision, holding that the Ohio Prevailing Wage law and regulations thereunder were preempted to the extent that they could be construed to restrain the federally protected use of job targeting programs. The Court stated: "J.A. Croson's claims seek to invoke Ohio law to thwart Local 189's use of its job targeting program" and "the prohibitions that J.A. Croson seeks to enforce under Ohio law cannot peacefully coexist with the [NLRB's] classification of job targeting as 'concerted activity' protected by Section 7 of the NLRA." The Court held: "Because the NLRB has held that job targeting is *actually* protected by

the NLRA, there is no room for state regulation infringing that conduct." (Petitioner's App. 17a).

STATEMENT OF FACTS

A. Local 189's Job Targeting Program

Job targeting is a program used by Local 189 to level the playing field between union and non-union contractors and increase the amount of work done by union members. The program works by using union dues for payments to defray a union contractor's costs and thereby create more work for union members.

The targeting program was designed by the Union to promote competitive bidding. Before preparing a bid, a contractor submits a form titled a "Request for Target" identifying the project and estimating an approximate number of hours of work for the project. This information is used by the Union in deciding whether to make the project a targeted job. The Union subsequently informs the contractors whether the project is targeted and if so, the amount that will be paid to the successful bidder per hour up to a maximum amount. Any contractor can then submit a bid.

If the contract is awarded to a union contractor, the contractor subsequently receives targeted funds from Local 189 in the amount of the targeted rate multiplied by the number of hours worked up to a maximum amount. The contractor pays all employees on the project the full prevailing wage as required by the collective bargaining agreement.

The targeting program is simply an effective strategy, voluntarily adopted by union members, to make union contractors more competitive so that union members work more. Croson initiated this litigation because the program is working and helping union members to improve their wages, hours and working conditions, the rights protected by Section 7 of the National Labor Relations Act, 29 U.S.C. §157.

B. Awarding of the Contracts at Issue

On or about February 15, 1990 and November 25, 1991, Croson submitted bids for the construction of two projects – the new Pickaway County Jail and the Water Softening System for the Pickaway County Jail. Both of these jobs were prevailing wage jobs. Croson was unsuccessful in its bids and the jobs were awarded to J.A. Guy.

Croson challenges the deduction of union dues from wages paid on the two projects in question. As set forth below, said Union dues were deducted by J.A. Guy pursuant to the applicable collective bargaining agreement and remitted to Local 189, which then determined how the dues were used.

C. Deduction of Union Dues Required by the Collective Bargaining Agreement

Effective June 1, 1989, Local 189 entered into a collective bargaining agreement with the Mechanical Contractors Association of Central Ohio, Inc. J.A. Guy was at all times material a party to the collective bargaining agreement.

Pursuant to the collective bargaining agreement, J.A. Guy was obligated to pay established wages and fringe benefits. J.A. Guy deducted 3 3/4% of the gross wages paid to its employees on the Water Softening System at the Pickaway County Jail Project and the new Pickaway County Jail Project and remitted that amount to the Union as dues. Local 189 then determined how the dues were used.

All Union dues, regardless of their purpose, are subject to approval by members of Local 189 pursuant to periodic secret ballot. Dues deductions are authorized by members under voluntarily signed authorizations for dues check-off.

J.A. Guy does not separately deduct dues devoted to any particular purpose and does not deduct any "special assessments." J.A. Guy merely acts as an agent for Local 189 for the collection of dues and has no control whatsoever over the disbursement of Union dues collected. J.A. Guy has not made any deduction not specifically required by the collective bargaining agreement.

REASONS FOR NOT GRANTING THE WRIT

A. NONE OF THE COMPELLING REASONS THAT WARRANT GRANTING A WRIT OF CERTIORARI ARE PRESENT HERE

In arguing that this Court should grant certiorari, Croson is asking that this Court step in to protect *Ohio* law from being preempted by *federal* law. The Ohio Supreme Court, the court of last resort on issues of Ohio

state law and the protector of Ohio's interest in applying its own law, has unanimously concluded that Ohio law should not be applied to these facts. There is no reason that this Court should be more concerned than the Ohio Supreme Court about protecting Ohio law from preemption by federal law.

In 1996, this Court refused to grant certiorari in another case filed by the same petitioner, J.A. Croson, which, like this case, asserted a state law challenge to job targeting. *J.A. Croson v. Central Ohio Joint Vocational School Dist.*, 104 Ohio App. 3d 146, *jurisdictional motion overruled*, 74 Ohio St.3d 1418 (1995), *cert. denied*, 517 U.S. 1155 (1996). In *Central Ohio Joint Vocational School District*, Croson attacked job targeting using another state law theory, arguing that targeting violated state competitive bidding laws. Croson sought this Court's review of a May 30, 1995 decision by the Ohio Court of Appeals for the Twelfth Appellate District that followed the same reasoning as the Ohio Supreme Court's decision in this matter. The Court of Appeals held:

> Application of [state law] in this case would allow a state court to regulate the procedure by which a union administers job targeting. . . . [T]he trial court did not err in finding that Croson's state law cause of action would be preempted because it involves activity arguably protected under Section 7 of the NLRA. (opinion, p. 10).

Croson filed a petition for writ of certiorari, making the same arguments that are made in its current petition. This Court denied the petition for writ of certiorari.

For the same reasons that the Court refused to grant the writ in 1996, the writ should not be granted here. While federal preemption cases can sometimes be complex, this is a straightforward case of preemption under the Supremacy Clause. Preemption, in its most simple, direct and indisputable form, means that state law cannot be applied to prohibit what is expressly protected by federal law. Participation in job targeting programs has definitively been held to be protected conduct under Section 7 of the National Labor Relations Act. *Manno Electric, Inc.*, 321 NLRB 278 (1996). Preemption necessarily follows under a long line of decisions from this Court. As set forth in detail below, there is no conflict between the Ohio Supreme Court's decision in this matter and any decision of this Court or the Circuit Courts of Appeal.

The writ should be denied for the further reason that this is not a case of national importance. In claiming that targeting programs have nationwide impact, Croson cites statistics from two of the nation's thousands of local unions, Local 189 and a local union in Minnesota (pg. 12 of brief). Croson has also made no comparison between Local 189's use of job targeting funds and the use of those funds in any other targeting programs.

Furthermore, this case presents no significant policy issues. The payroll deductions used by Local 189 for job targeting were voluntarily approved by the employees whose pay is at issue. Accordingly, there is no threat, as Croson speculates, that deductions for targeting might grow to account for an increasingly large percentage of employee pay. Indeed, Croson's policy concerns are plainly hollow, inasmuch as Croson seeks to use the

prevailing wage law as a weapon to harm collective bargaining by interfering with the deduction of Union dues required to be deducted under collective bargaining agreements. Croson turns the law on its head in an effort to *attack* collective bargaining, when the state law was passed in an effort to *support* collective bargaining. *State ex rel. Evans v. Moore*, 69 Ohio St. 2d 88 (1982).

This case does not call into doubt Ohio's general authority to enforce its Prevailing Wage law. No party to this action has ever claimed that the Ohio Prevailing Wage Statute is somehow invalid in its entirety, nor has any party questioned its general applicability. Rather, the issue presented by this case is much more narrow. Croson claims that J.A. Guy's deduction of dues used by the Union for job targeting violated a regulation, Ohio Administrative Code §4101:9-4-07 (B)(6), which prohibits deduction of "special assessments". Preemption applies because that regulation cannot be interpreted or applied to prohibit deduction of union dues used for job targeting, inasmuch as the NLRB has held that such deductions are expressly protected by federal labor law. To this very limited, specific extent, federal and state law are in conflict, and federal law must prevail. There is no basis for concern that Ohio's entire system of regulation of prevailing wage is about to come crashing down.

B. WHEN FEDERALLY PROTECTED CONDUCT IS POTENTIALLY PROHIBITED BY STATE LAW, PREEMPTION OCCURS UNDER BOTH THE SUPREMACY CLAUSE AND GARMON

1. THIS IS A STRAIGHTFORWARD CASE OF PREEMPTION UNDER THE SUPREMACY CLAUSE

This case involves federal preemption in its most elementary form. Where federal law protects the conduct in question it is unnecessary to conduct voluminous reviews of the various types of federal preemption law or the policies of federal labor law to see that this is a classic case of preemption. If preemption ever applies, it applies here. Preemption boils down to federal law prevailing over state law. In this case this fundamental notion means that Ohio law cannot prohibit what federal law protects.

As the Ohio Supreme Court recognized, where state regulation would, in fact, inhibit federally protected activity, the preemption analysis is at an end. (App. 15a). The Court quoted the following portion of *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 250 (1959):

> The threshold question in every labor pre-emption case is whether the conduct with respect to which a State has sought to act is, or may fairly be regarded as, federally protected activity. Because conflict is the touchstone of pre-emption, **such activity is obviously beyond the reach of all state power.**

(emphasis added). The Ohio Supreme Court also properly heeded the caveat in *Railroad Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969), where this Court held:

> In referring to decisions holding state laws pre-empted by the NLRA, ***care must be taken to distinguish pre-emption based on federal protection of the conduct in question . . . from that based predominantly on the primary jurisdiction of the National Labor Relations Board.*** . . .

(emphasis added) (App. 15a). *See also, Farmer v. Carpenters*, 430 U.S. 290, 295 (1977).

This case involves the branch of preemption based on federal protection of the conduct in question. In its brief, Croson loses its way and spends many pages of analysis on the doctrines of preemption based on the jurisdiction of the National Labor Relations Board. That error makes this case appear to be more complex than it really is.

There can be no question that the Ohio prevailing wage law, as interpreted by Croson, would prohibit the exact conduct that federal law protects. This requires preemption. Deduction of union dues for job targeting programs has already been held by the NLRB to be protected conduct under federal law in *Manno Electric, Inc., supra*. In *Manno*, a non-union contractor filed a state court lawsuit seeking to prohibit job targeting under several state law theories. The Administrative Law Judge noted that "Whether the Plaintiff may pursue a state lawsuit based on such a claim ***depends on whether the job targeting program is protected by the [National Labor Relations] Act.***" 321 NLRB 278, 298 (1996). The NLRB affirmed that the plaintiff's state law claims were preempted and that the filing of the state court lawsuit by the non-union contractor interfered with activities protected by the NLRA:

> Section 7 [of the NLRA] provides that employees shall have the right 'to engage in other concerted activities for the purpose of . . . other mutual aid or protection.' ***The objectives of the job targeting program are to protect employees' jobs and wage scales. These objectives are protected by Section 7.*** Thus, the plaintiff's [state court] suit, which interferes with, restrains, and coerces employees in their Section 7 rights, offends Section 8(a)(1) of the (National Labor Relations) Act. The claims which the Plaintiff sought to press were pre-empted.

[Emphasis added; *Id.*].

This authority squarely stands for the proposition that job targeting programs are protected by federal law and any state law is preempted to the extent that it limits or impairs such federally protected activity. The Ohio statute, as Croson interprets it, would regulate and prohibit the exact conduct that the NLRA authorizes and specifically protects. This requires preemption.

Croson nevertheless argues that preemption would apply only if Croson could have presented the identical controversy to the NLRB. In making this argument, Croson misapplies this Court's decision in *Sears, Roebuck and Co. v. San Diego County District Council of Carpenters*, 436 U.S. 180 (1978).[1] It is not important whether Croson

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[1] Croson could in fact have presented this matter to the NLRB. See *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489, 515-17 n. 11 (5th Cir. 1982) ("[A]ny person, even a stranger to the collective bargaining agreement can bring unfair labor practice charges.").

could have presented this controversy to the NLRB. That inquiry pertains only to the branch of preemption based on protecting the jurisdiction of the NLRB, not that based on federal protection of the conduct in question as involved here. *Sears*, 436 U.S. at 202.

Croson also suggests that even though job targeting is protected activity, this should not be the end of the preemption inquiry. Croson asserts that some circumstances might possibly exist, although they are not identified, under which state law might be applied to regulate, without completely prohibiting the federally protected activity of job targeting. The fundamental flaw in Croson's argument is that state law as interpreted by Croson would prohibit the use of job targeting **under any circumstances.** As expressly recognized by the Ohio Supreme Court, J.A. Guy could not both comply with its collective bargaining agreement *and* with Croson's interpretation of the Ohio prevailing wage law. Croson suggested in the courts below that J.A. Guy simply pay more than required under the collective bargaining agreement, so that after deduction of the Union dues for the targeting program, Union employees still receive what Croson considers the full prevailing wage. However, J.A. Guy would plainly violate federal law by unilaterally altering the terms of the collective bargaining agreements by changing employee wages. *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967). Moreover, increasing employee wages in the manner suggested would, in the words of the Ohio Supreme Court, "seriously hinder the effectiveness of job targeting programs and, in many instances, disadvantage union contractors in bidding on public improvement

projects" and thereby "largely offset their intended benefit." App. 22a, n. 3.

Croson's analogy to the use of state trespass laws to regulate federally protected picketing is thus unavailing. While state trespass laws may be applied to regulate the time, place and manner of picketing, state law as interpreted by Croson herein would completely bar the federally protected activity of job targeting.

2. CROSON'S CLAIMS ARE PREEMPTED UNDER *GARMON*

a. Federal Preemption Also Applies When An Activity is Arguably Protected or Prohibited by Federal Law

As set forth above, this is a simple, compelling case of preemption because the conduct involved, deduction of union dues for job targeting, has been expressly held to be protected under federal law. No further analysis is necessary. In the words of the Ohio Supreme Court, "Where state regulation would, in fact, inhibit federally protected activity, there is no need to invoke the primary-jurisdiction rationale set forth in *Garmon*." (App. 15a). *Garmon*, 359 U.S. at 250. However, a correct analysis of the doctrines of preemption law relating to the jurisdiction of the NLRB further supports the conclusion that preemption applies.

In *Garmon*, this Court held that states may not regulate an activity if that activity is either arguably protected or prohibited by the National Labor Relations Act. Under *Garmon*, preemption applies not only where there is a

conflict between state regulation and federal labor law, but also when there is a potential for conflict. *Id.* at 246.

In *Building & Constr. Trades Council v. Associated Bldrs. and Contractors, Inc.*, 507 U.S. 218 (1993), this Court said that preemption prohibits state regulation of activities that are either protected or prohibited by the NLRA/LMRA, and also those which are "only arguably" protected or prohibited by the NLRA/LMRA. 507 U.S. at 225. The Court concluded: "When we say the NLRA preempts state law, we mean that the NLRA *prevents a State from regulating within a protected zone.*" *Id.* at 226-227 (emphasis added).

The activities involved here – the check-off and collection of union dues or assessments under a collective bargaining agreement, and their intended use – are clearly within this protected zone. *Communication Workers v. Beck*, 487 U.S. 735 (1988). The *Beck* Court held that "there can be no doubt" that issues over the collection and use of union dues, fees and assessments, and claims against an employer and union about the collection and use of such funds, are governed by §8 of the NLRA and preempted by the *Garmon* rule. *Id.* at 742. The Court said that a claim about these activities "falls squarely within the primary jurisdiction of the [NLRB]." *Id.* The Court found that a challenge to the use of union dues for purposes other than collective bargaining is subject to Section 8 and therefore preempted under *Garmon*.

b. Failure to Deduct Job Targeting Dues as Required by the Collective Bargaining Agreement Would Violate Federal Law

As set forth above, *Garmon* preemption also applies when the regulated activity is actually or arguably prohibited by federal law. Preemption applies here for the further reason that J.A. Guy could comply with the Ohio prevailing wage law as Croson interprets it only by ceasing to deduct and remit the dues used by the Union for the job targeting program. This would constitute a breach of the collective bargaining agreement, which is itself a violation of federal labor law. It is well-established that an employer who ceases to deduct and remit union dues and other payments called for by a collective bargaining agreement violates NLRA §8(a)(1) and (5), 29 U.S.C. §158. *Shen-Mar Food Products, Inc.*, 221 NLRB 1329, *enforced as modified*, 557 F.2d 396 (4th Cir. 1977). Croson's claim is therefore preempted under *Garmon* for this additional reason.[2]

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[2] J.A. Guy also would not have the option of increasing employee wages to make up for the 2% of dues used by the Union for job targeting. It is well-settled that an employer cannot unilaterally modify a term or condition of employment which is a mandatory subject of collective bargaining. Under NLRA §8(d), an employer is required to bargain collectively as to "wages, hours, and other terms of employment." An employer violates NLRA §§8(a)(1) and (5) by unilaterally changing a term or condition of employment which is a mandatory subject of bargaining. *NLRB v. C&C Plywood Corp.*, 385 U.S. 421 (1967); *NLRB v. Katz*, 369 U.S. 736 (1962). Increases and decreases in wages are the clearest examples of mandatory subjects of bargaining under the NLRA, and an employer violates NLRA §§8(a)(1) and (5) by unilaterally increasing

3. THE AUTHORITY CITED BY CROSON HAS NO RELEVANCE HERE

Croson virtually ignores *Manno Electric* and the consequences of the NLRB's holding that participation in job targeting programs is protected activity under federal law. As interpreted by Croson, the regulation at issue would prohibit the exact conduct that federal law protects. This requires preemption. The authority cited by Croson does not change this conclusion.

a. *Dillingham Construction* Has Absolutely No Relevance Here

Croson relies heavily on this Court's decision in *California Div. of Labor Standards Enforcement v. Dillingham Construction*, 519 U.S. 316, 136 L.Ed.2d 791, 117 S. Ct. 832 (1997), which even a cursory analysis shows is inapposite. The issue in that case, as framed by this Court, was:

> This case presents the question whether the preemption provision of the Employee Retirement Income Security Act of 1974 (ERISA) [citation omitted] supersedes California's prevailing wage law to the extent that the law prohibits payment of an apprentice wage to an apprentice trained in an unapproved program.

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wages subject to a collective bargaining agreement. *NLRB v. C&C Plywood, supra,* (unilateral merit increases in wages); *NLRB v. Katz, supra* (same).

519 U.S. at ___, 136 L.Ed.2d at 796. The Court explained that the issue came down to "whether California's prevailing wage statute 'relate[s] to' that 'employee benefit plan' within the meaning of ERISA's preemption clause." *Id.* 136 L.Ed.2d at 799. Contrary to Croson's representation, *Dillingham* has nothing to do with preemption under federal labor law at all, let alone preemption relating to deduction of union dues as required by, and protected by, federal law. Croson also asserts that federal labor law preemption was addressed at the district court level in *Dillingham*, but a review of that decision shows that the district court carefully avoided the issue of whether a prevailing wage law could supersede collectively bargained-for wage rates: "The issue before this Court is the State's authority to require apprenticeship program approval, ***not the State's authority to preempt the collective bargaining process when it comes time to adjust apprentice's wage standards***. . . . " [emphasis added; 778 F. Supp. 1522, 1533 (N.D. Calif. 1991)].

b. *Building and Construction Trades v. Reich* and *International Bhd. of Electrical Workers v. Brock* are Inapposite

Croson relies upon two decisions involving the *federal* Davis-Bacon Act, *Building and Construction Trades v. Reich*, 40 F.3d 1275 (D.C. Cir. 1994), and *International Bhd. of Electrical Workers v. Brock*, 68 F.3d 1194 (9th Cir. 1995). Both cases have no relevance here because they are based solely on the provisions of the federal Davis-Bacon Act, and have nothing to do with preemption of state law.

Croson suggests that if preemption applied, it would have applied to prevent the federal courts in *Reich* and *Brock* from reaching their decisions construing the federal Davis-Bacon Act. This ignores the type of preemption applicable here. As held by this Court in *Railroad Trainmen, supra, state* law cannot be applied to prohibit what is protected by federal law under basic principles of federalism. Moreover, as expressly held in *Connell Constr. v. Plumbers and Steamfitters*, 421 U.S. 616, 626 (1975), "*federal* courts may decide labor law questions that emerge as collateral issues in suits brought under independent *federal* remedies, including antitrust laws." (italics added) The Court went on to state: "Although we hold that the union's agreement with Connell is subject to *federal* antitrust laws, it does not follow that *state* antitrust laws may apply as well." *Id.* at 635 (italics added).[3]

C. THE STATE LAW AT ISSUE IS PREEMPTED EVEN IF IT IS A MINIMUM LABOR STANDARD

Croson argues at length that the Ohio Prevailing Wage Law is not preempted because it is a minimum

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[3] Even if the Court were to conclude that there is a conflict between the interpretations of federal law by the NLRB in *Manno Electric, supra,* and the Circuit Court in *Building and Construction Trades v. Reich, supra,* this is obviously not the case for resolving any such perceived conflict. If such a conflict exists, it is between interpretation of two federal statutes, the NLRA and the federal Davis-Bacon Act. By contrast, this case involves a very different conflict between federal law and the Ohio Prevailing Wage law and particular regulations adopted thereunder.

labor standard enacted under the police power. Relying upon *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 749 (1985), Croson contends that federal labor laws do not preempt state labor regulations imposing minimal standards of employment.

Croson's analysis reflects a fundamental misunderstanding of the basis for preemption in this matter. *Metropolitan Life* was decided under a completely different preemption doctrine, *Machinists* preemption. In *Machinists v. Wisconsin Employment Relations Commn.*, 427 U.S. 132 (1976), this Court enunciated a separate, fundamental principle of federal labor law preemption, as follows:

> A second pre-emption doctrine protects against state interference with policies implicated by the structure of the Act itself, by pre-empting state law and state causes of action concerning **conduct that Congress intended to be unregulated.** The doctrine was designed, at least initially, to govern pre-emption questions that arose concerning **activity that was neither arguably protected against employer interference** by §7 and 8(a)(1) of the NLRA, **nor arguably prohibited** as an unfair labor practice by §8(b) of that Act. 29 U.S.C. §§157, 158(a)(1) and (b). Such action falls outside the reach of *Garmon* pre-emption.

(emphasis added) *Metropolitan Life, supra*, 471 U.S. at 349.

Machinists preemption does not pertain to conduct that is either clearly or arguably protected under the NLRA. Instead, it involves a range of activity that is not expressly regulated under the NLRA, but that Congress

intentionally left to be controlled by the free play of economic forces.

This case involves a very different, much stronger basis for preemption, inasmuch as state law is preempted because the conduct at issue is **actually protected by federal law**. As recognized by the Ohio Supreme Court, even if a state has a strong interest in applying its own law, state law cannot be applied to prohibit conduct that is protected by federal law. Citing this Court's decision in *Brown v. Hotel & Restaurant Employees & Bartenders Internatl. Union Local 54*, 468 U.S. 491, 502-503 (1984), the Ohio Supreme Court stated: "Preemption exceptions based on local interests are, in fact, inapplicable where state regulation would restrain or inhibit activity that is actually protected by Section 7 of the NLRA." (App. 18a). In *Brown*, this Court explained:

> If the state law regulates conduct that is actually protected by federal law, however, pre-emption follows not as a matter of protecting primary jurisdiction, but as a matter of substantive right. Where, as here, the issue is one of an asserted substantive conflict with a federal enactment, then **'[t]he relative importance to the State of its own law is not material** . . . for the Framers of our Constitution provided that the federal law must prevail. *Free v. Bland*, 369 U.S. 663, 666 (1962)." (Citations omitted).

(emphasis added). *Brown, supra*, 468 U.S. 491, 502-503 (1984). As this Court stated in *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 480 (1955), "Controlling and therefore superseding federal power cannot be curtailed by the State even though the ground of intervention be different

than that on which federal supremacy has been exercised." The fact that the Ohio Prevailing Wage law may have been enacted pursuant to the police power is therefore not material.[4]

Furthermore, Croson misapprehends the nature of the preemption issue, inasmuch as J.A. Guy and Local 189 do not now and have never contended that the Ohio prevailing wage law is preempted in its entirety. There is no dispute as to Ohio's authority under the police power.

The preemption issue presented by this case is much more limited than that described by Croson – it is the narrow issue of whether a specific regulation under the Ohio prevailing wage law can be applied to prohibit deduction of union dues as required by the collective bargaining agreement. Croson claims that J.A. Guy's deduction of dues used by the Union for job targeting violated O.A.C. §4101:9-4-07 (B)(6), which prohibits deduction of "special assessments". To this very limited, specific extent, federal and state law are in conflict. Therefore, the regulation relied upon is preempted only

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[4] This case is not about a minimum labor standard of the type referred to in *Metropolitan Life*. The regulation relied upon by Croson, O.A.C. §4101:9-4-07 (B)(6) prohibits certain deductions without regard to whether the amount of wages paid equals the prevailing wage. The regulation thus has nothing to do with a minimum level of wages. The issue in this case is not the total amount of wages paid by J.A. Guy. There is in fact no dispute that J.A. Guy paid the full prevailing wage, aside from the issue of whether 2% of the 3 3/4% of dues required to be deducted under the collective bargaining agreement constituted a prohibited deduction under the cited regulation.

as it is sought to be applied by Croson. The validity and general applicability of the Prevailing Wage Statute and Ohio's authority under the police power are simply not at issue here.

CONCLUSION

In 1996, this Court refused to grant a petition for a writ of certiorari filed by the same party, J.A. Croson, under very similar circumstances. *J.A. Croson v. Central Ohio Joint Vocational School Dist.*, supra, 74 Ohio St.3d 1418 (1995), *cert. denied*, 517 U.S. 1155 (1996). In that case, J.A. Guy asserted a state law challenge to a union job targeting program. In that case, like this one, the Ohio courts held that J.A. Guy's claims were preempted by federal law. For the same reasons that the Court refused to grant the writ in 1996, the writ should not be granted here. This is a straightforward case of preemption under the Supremacy Clause. Participation in job targeting programs has definitively been held to be protected conduct under Section 7 of the National Labor Relations Act. *Manno Electric, Inc., supra.* Preemption necessarily follows under a long line of decisions from this Court, and there is no conflict between the Ohio Supreme Court's decision in this matter and any decision of this Court or the

Circuit Courts of Appeal. Accordingly, the petition for writ of certiorari should be denied.

Respectfully Submitted,

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